SAN JUAN COUNTY COMMISSION

IBLA 81-649, 81-881 Decided January 4, 1982

Appeals from that part of a decision of the Utah State Office, Bureau of Land Management, designating 14 units in the Moab District as wilderness study areas (UT-060-140A, et al.) and from that part of a decision of the Utah State Office adding additional acreage to a wilderness study area (UT-060-201).

IBLA 81-649 affirmed; IBLA 81-881 dismissed.

1. Appeals--Federal Land Policy and Management Act of 1976: Wilderness--Rules of Practice: Appeals: Dismissal--Rules of Practice: Appeals: Timely Filing

   Where, in a decision published in the Federal Register designating wilderness study areas pursuant to sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1976), the Bureau of Land Management grants interested parties 30 days to initiate a protest challenging the decision, the 30-day appeal period as to that decision will commence upon expiration of the 30 days accorded for filing protests. An appeal filed after the time period allowed must be dismissed.

2. Federal Land Policy and Management Act of 1976: Wilderness--Wilderness Act

   Where a BLM state office issues a decision adding additional acreage to a wilderness study area in response to a protest which points out that BLM failed to obtain an exception from the Director, BLM, in accordance with Organic Act Directive 78-61, Change 3, July 12, 1979, permitting it to exclude such land because of a failure to satisfy the outstanding opportunity criterion, and the record supports a finding that the unit as a

> whole satisfies that criterion, the decision to add the acreage will be affirmed in the absence of a showing of compelling reasons for modification or reversal.

APPEARANCES: Calvin Black, Chairman, San Juan County Commission, for appellant; Dale D. Goble, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management. 1/

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The San Juan County Commission (Commission) has appealed from that part of a decision of the Utah State Office, Bureau of Land Management (BLM), dated November 3, 1980, designating 14 units in the Moab District as wilderness study areas (WSA), pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1976). 2/ Notice of the BLM decision was published in the Federal Register on November 14, 1980. See 45 FR 75602 (Nov. 14, 1980). The Commission has also appealed that part of a decision of the Utah State Office, BLM, dated February 26, 1981, adding additional acreage to WSA UT-060-201 (Road Canyon). Notice of the BLM decision was published in the Federal Register on March 5, 1981. See 46 FR 5332 (Mar. 5, 1981). 3/

The Federal Register notice, dated November 14, 1980, provided that the BLM decision would "become final at 4:30 p.m. on December 15, 1980, for all units except for units that a timely written protest on a[n] individual unit decision is received by the Utah State Director prior to that date." 45 FR 75604 (Nov. 14, 1980). The notice further provided that:

1/ The State of Utah filed a request to appear as amicus curiae in IBLA 81-881. Because of our disposition of that appeal on jurisdictional grounds, we make no ruling on the request.

2/ The designated units are:

UT-060-140A (Behind the Rocks) UT-060-164 (Lockheart Basin)
UT-060-167 (Bridger Jack Mesa) UT-060-169 (Butler Wash)
UT-060-188 (Pine Canyon) UT-060-191 (Cheesebox Canyon)
UT-060-196 (Bullet Canyon) UT-060-197/198 (Slickhorn Canyon)
UT-060-201 (Road Canyon) UT-060-204 (Fish Creek Canyon)
UT-060-205B (Mule Canyon) UT-060-224 (Sheiks Flat)
UT-060-227 (Squaw Canyon) UT-060-229 (Cross Canyon)

3/ On April 1, 1981, the Commission filed a notice of appeal "protesting the addition of 30,260 acres to the Wilderness Study Area [WSA] UT-060-201, Road Canyon Unit." This appeal was docketed IBLA 81-649. On April 16, 1981, the Commission filed a notice of appeal dated April 10, 1981, "protesting the inclusion of the following [14] Wilderness Study Areas in San Juan County, Utah in the Wilderness Study Program." The 14 WSA's listed by the Commission included UT-060-201. This appeal was docketed IBLA 81-881.

> At the conclusion of the protest period, the State Director will publish in the Federal Register a notice of the inventory units that were not protested and the decision on those are final. The notice will identify the inventory units which have received a protest, and the decision on such units will not become final until a final decision is issued on the protest.
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> The State Director will issue a written decision on each unit protest filed according to the above requirements and in addition will publish a notice in the Federal Register of the action taken on each protest. Any person adversely affected by the State Director's written decision on an individual unit protest, may appeal from that decision under provisions of 43 CFR Part 4.

Id. Appellant did not file a protest. However, BLM received 69 protests concerning various units, including protests filed by the Utah Wilderness Association, et al. concerning UT-060-201 (Road Canyon).

On March 5, 1981, BLM published in the Federal Register a notice of the decisions made with respect to protests filed during the protest period. See 46 FR 5332 (Mar. 5, 1981). 4/ With respect to units involved herein, BLM denied protests for UT-060-188, UT-060-191, UT-060-196, UT-060-197/198, UT-060-204, and UT-060-224, and accepted protests in part for UT-060-201 and UT-060-205B. In each of the latter two cases, BLM approved the inclusion of additional acreage in the WSA. The Federal Register notice further provided that:

> Any person(s) who has information which he/she believes will show that the November 14, 1980, decision which is changed as a result of the protest decision is incorrect, may appeal to the Interior Board of Land Appeals. Also, each protestant is allowed the right of appeal to the Interior Board of Land Appeals within 30 days from the date of service on his/her individual decision(s). In the event no appeal is filed, the decision will become final as of 4:30 p.m., April 6, 1981. [Emphasis added.]

46 FR 5334 (Mar. 5, 1981). Regarding the remaining unprotested units, the notice stated: "The decision on these units became final at 4:30 p.m., December 15, 1980." Id.

BLM has filed a motion to dismiss the appeals docketed as IBLA 81-649 and IBLA 81-881 urging that they were untimely filed. We will first consider whether the appeal docketed IBLA 81-881 was timely.

4/ This notice was republished on Mar. 12, 1981, in order to remove certain material which "was inadvertently published" and "for the convenience of the reader." 46 FR 16340 (Mar. 12, 1981). The notice was unchanged with respect to material discussed herein.

[1] The applicable regulation, 43 CFR 4.411(a), provides that a notice of appeal "must be transmitted in time to be filed in the office, where it is required to be filed within 30 days after the person taking the appeal is served with the decision from which he is appealing."

The decision from which appellant is appealing is the November 3, 1980, BLM decision published in the Federal Register on November 14, 1980. 5/ See 43 CFR 4.410. That decision did not become "final" until December 15, 1980. The effect of the decision was suspended to permit interested parties to protest the decision designating WSA's. Therefore, the running of the appeal period did not commence until the end of the protest period for those units for which no protest was filed. State of Alaska, 42 IBLA 94 (1979). 6/ Protests were not filed for six of the units in question (UT-060-140A, UT-060-164, UT-060-167, UT-060-169, UT-060-227, and UT-060-229). Accordingly, as to those six units appellant had until January 14, 1981, to appeal the November 1980 BLM decision. Appellant's notice of appeal in IBLA 81-881 was not filed until April 16, 1981.

The BLM decision on the protests gave the right of appeal to any person aggrieved by a change in the November 1980 decision made as a result of a protest. Also, BLM gave the right of appeal to protestants. For the remaining eight units in question, for which protests were received, no change was made for six. Since appellant had not protested, it had no right of appeal from the protest decision as to those six units. For appellant's purposes, the appeal period for those six units expired at close of business on January 14, 1981. This is true even though appellant could not have known the outcome of the protests at that time. Had appellant desired to preserve an appeal right beyond January 14, 1981, it should have protested the November 1980 decision.

For the other two units in question, for which acreage was added in response to protests (UT-060-201 and UT-060-205B), the appeal period ran from the date of publication in the Federal Register of the

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5/ Appellant is deemed to have been "served" with the Nov. 3, 1980, BLM decision, as provided by 43 CFR 4.411(a), when it was published in the Federal Register on Nov. 14, 1980. Publication in the Federal Register gives legal notice of the matters published therein and in this case satisfies the purpose of service. See 44 U.S.C. § 1507 (1976). The same would hold true for publication in the Federal Register of the Mar. 5, 1981, decision on the protests.

6/ The fact that the Nov. 14, 1980, Federal Register notice did not contain the standard appeals paragraph is of no effect. As we stated in State of Alaska, supra at 100 n.4:

"This Board has the exclusive power to decide who may or may not appeal to it, and the inclusion or omission of the appeals paragraph is not controlling upon the Board's determination. See generally Fancher Brothers, 33 IBLA 262 (1978); Frank and Rene Lock, IBLA 76-608, Order of May 20, 1977."

notice of decisions on the protests (March 5, 1981), until April 6, 1981. Appellant's notice of appeal in IBLA 81-881 was not filed until April 16, 1981.

The applicable regulation, 43 CFR 4.401(a), provides a 10-day "grace period" for the filing of documents. A delay in filing

> will be waived if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed. [Emphasis added.]

43 CFR 4.401(a). Appellant is not entitled to a waiver of its late filing, pursuant to 43 CFR 4.401(a), because the date of the mailing of its notice of appeal (appeal dated April 10, 1981, and postmarked April 14, 1981) indicates that it was not transmitted before the end of the 30-day appeal period. See, e.g., John Oakason, 13 IBLA 99 (1973).

The timely filing of a notice of appeal is required to establish the jurisdiction of the Board and failure to file timely mandates dismissal of the appeal. DNA-People's Legal Services, 49 IBLA 307 (1980); Ilean Landis, 49 IBLA 59 (1980). The purpose of this rule is to establish a definite time when administrative proceedings regarding a particular matter are at an end in order to protect other parties to the proceedings and the public interest.

Appellant had notice of both the decision designating WSA's and the decisions made with respect to protests filed; however, for whatever reason, it waited until after the protest and appeal periods to file the notice of appeal in IBLA 81-881. BLM's motion to dismiss as to IBLA 81-881 is granted and, for the above stated reasons, IBLA 81-881 is dismissed. However, BLM's motion as to IBLA 81-649 must be denied. IBLA 81-649 is appellant's appeal from the March 5, 1981, protest decision. Appellant appealed the inclusion of additional acreage (30,260 acres) in WSA UT-060-201 (Road Canyon). As stated above, a person aggrieved by such a change was given the right to appeal to the Board, appeals to be filed by April 6, 1981. Appellant's notice of appeal in IBLA 81-649 was filed April 1, 1981. The appeal was timely; therefore, we will consider the merits of the appeal.

In its statement of reasons for appeal, appellant makes the following contentions:

> 1. This area should not be considered for a WSA because of nine miles of roads that go through the unit. Eleven additional miles are cherrystemmed but still take away the naturalness of the unit.

2. There are two school sections proposed for chaining and reseeding bordering the unit.

3. Over 1/2 of the unit lies within the area zoned as agricultural in the county's master plan of 1968-1985.

4. There are at least 28 oil and gas leases in the unit.

5. The BLM area study team recommended that this area be dropped for the wilderness study proposal and the recommendation was accepted [but] due to an error in the Utah State BLM office a certificate of exception was never issued. 7/

The "certificate of exception" mentioned in appellant's statement of reasons is a reference to an exception which a BLM state office is required to obtain under certain circumstances from the Director, BLM, during the intensive wilderness inventory, prior to adjusting the boundary of a unit on the basis of the absence of an outstanding opportunity for solitude and/or a primitive and unconfined type of recreation. 8/ This requirement is set forth in Organic Act Directive (OAD) 78-61, Change 3, dated July 12, 1979, as part of a lengthy discussion of when and under what circumstances a BLM state office could adjust a unit boundary:

(2) Boundary adjustment. As a general rule, the boundary of a unit is to be determined based on evaluation of the imprints of man within the unit, and should not be further constricted on the basis of opportunity for solitude or primitive and unconfined recreation.

7/ We note that these reasons for appeal were taken almost verbatim from public comments submitted by appellant in a letter dated June 9, 1980, and from a notice of appeal/statement of reasons filed by appellant in IBLA 81-881. These comments and the notice of appeal/statement of reasons were directed towards the entire unit. The present reasons for appeal differ only in that the first sentence refers to "[t]his area" rather than "[t]his unit" and in the inclusion of reason number 5. Therefore, there is some question of the relevance of the reasons for appeal, with the exception of number 5 which specifically relates to the additional acreage.

8/ An outstanding opportunity for solitude or a primitive and unconfined type of recreation is one of the three key wilderness characteristics taken from section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976), which is assessed during the inventory phase of the wilderness review mandated by section 603(a) of FLPMA, supra. The other key characteristics are size and naturalness. Naturalness is said to be present in an area which "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." 16 U.S.C. § 1131(c) (1976).

> A unit is not to be disqualified on the basis that an outstanding opportunity exists only in a portion of the unit. Each individual acre of land does not have to meet the outstanding opportunity criterion. Obviously, there must be an outstanding opportunity somewhere in the unit.
>
> There may be unusual cases where due to configuration it may be appropriate to consider adjusting the boundary based on the outstanding opportunity criterion. There are several examples where this may occur:
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> (a) When a narrow finger of roadless land extends outside the bulk of the unit;
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> (b) When land without wilderness characteristics penetrates the unit in such a manner as to create narrow fingers of the unit (e.g., cherrystem roads closely paralleling each other);
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> (c) When extensive inholdings occur and create a very congested and narrow boundary area. These situations are expected to rarely occur, and boundary adjustments in such cases may only be made with State Director approval. Very good judgment will be required in locating boundaries under such conditions so as to exclude only the minimum appropriate land. Such boundary adjustments are not permissible if the land in question possesses an outstanding opportunity for primitive and unconfined recreation. [Emphasis in original.]
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> The above cases are the only ones in which the boundary may be adjusted on considerations other than imprints of man. Any other exceptions to boundary adjustment must be approved by the Director (430). [Emphasis added.]

OAD 78-61, Change 3, at 3.

The record indicates that the Utah State Office apparently sought and purportedly obtained an exception with respect to the southern and eastern portions of unit UT-060-201. These areas were not considered by the State Office to have either an outstanding opportunity for solitude or a primitive and unconfined type of recreation. BLM stated in its narrative summary of its intensive inventory approved by the State Director on March 20, 1980, under the heading "Rationale for Recommendation":

> In accordance with OAD 78-61, Change 3, an exception was granted by the Director to adjust the boundaries of this unit. Under this authority, the southern and eastern portions of the unit are being omitted from the

> WSA due to the lack of outstanding opportunities for either solitude or primitive and unconfined recreation in these areas. This affects about 41,140 acres. A total of 41,430 acres does not meet WSA criteria and is recommended to be released from interim wilderness management.

This statement was reiterated in a letter to the Sierra Club, Utah Chapter, from the District Manager, Moab District, BLM, dated September 29, 1980.

In their protests, the Utah Wilderness Association, et al., contended, in part, that there was no evidence that the Utah State Office had obtained an exception from the Director, thereby permitting it to adjust the boundary of unit UT-060-201 on the basis of the absence of an outstanding opportunity for solitude and/or a primitive and unconfined type of recreation.

In its responses to the protests, the Utah State Office admitted that no exception had been granted by the Director:

> The MDO [Moab District Office] letter to the Sierra Club referred to a Director's exception to OAD 78-61, Change 3, as the basis for the southern and eastern boundary of the WSA. The MDO requested a Director's exception, as explained in the letter of September 29, because it was felt that areas in the southern and eastern portions of the unit did not exhibit characteristics conducive to outstanding opportunities for solitude or primitive and unconfined recreation. Your letter of protest does not offer substantive evidence to the contrary, and the BLM position regarding these opportunities remains unchanged.
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> Through a misunderstanding between MDO, this office, and the Washington Office, the Road Canyon unit was inadvertently not included in an exception granted by the Director concerning other units in the state. This point of your protest is correct, and WSA boundaries have been adjusted to correct this. Let me stress, however, that this was an oversight, as the Moab District Office was under the impression that the requested exception had been granted, as reflected in their letter of September 29.

Letter to Utah Wilderness Association, dated February 26, 1981, at 3. The unit boundaries, however, were adjusted "on the south and east to follow human imprints or exclude limited areas as per OAD 78-61, Change 3." Id. at 4. Accordingly, an additional 30,260 acres, rather than the 41,140 acres requested by the protestants, was included in the WSA. No appeal from this decision was filed by the protestants.

[2] Section 603(a) of FLPMA, supra, requires the Secretary of the Interior to review roadless areas of 5,000 areas "identified during the inventory required by section 1711(a) of this title as

having wilderness characteristics described in the Wilderness Act of September 3, 1964 [16 U.S.C. § 1131 (1976)]." As noted above, of the three key wilderness characteristics, i.e., size, naturalness, and an outstanding opportunity for solitude or a primitive and unconfined type of recreation, only the latter characteristic does not directly affect the configuration of the unit. The specific outlines of a unit must be drawn such that it is of a requisite size and such that it "generally appears to have been affected primarily by the forces of nature." 16 U.S.C. § 1131(c) (1976) (emphasis added). However, as noted in OAD 78-61, Change 3, a unit is merely required to have an outstanding opportunity for solitude or a primitive and unconfined type of recreation. The opportunity need not be present at all times and at all places in the unit. Tri-County Cattlemen's Association, 60 IBLA 305 (1981).

With respect to boundary adjustments BLM has indicated that as a general rule the boundary adjustments of a unit are determined by an evaluation of the imprints of man within the unit and are not subject to constriction on the basis of the outstanding opportunity criterion. OAD 78-61, Change 3, however, provides three examples, quoted supra, where a BLM state office could adjust a unit boundary based on the outstanding opportunity criterion, and a mechanism for a state office to obtain an exception from the Director, BLM, to allow adjustment when circumstances other than those set forth in the examples are present. An exception was sought in this case, but never obtained, with regard to the 30,260 acres in dispute. Thereafter, apparently rather than reapplying for an exception, the Utah State Office decided to include the 30,260 acres in the WSA. We decline to draw any conclusion from BLM's decision not to reapply for an exception. We wish to point out only that the record supports a finding that unit UT-060-201, taken as a whole, does have an outstanding opportunity for solitude or a primitive and unconfined type of recreation. 9/ The record provides no reason to disturb BLM's decision to designate the unit, as presently drawn, a WSA.

9/ During the intensive inventory a BLM employee on Feb. 12, 1980, provided the following narrative description concerning the opportunities for solitude in UT-060-201:

"Outstanding opportunities for solitude are present in the canyon drainages of the unit. These canyons (Road Canyon, Lime Canyon and their tributaries) provide extensive topographic and vegetative screening. The depth of the canyons vary from 800' at the mouths, to 80' at the heads of the canyons. The riparian vegetation in the canyon bottoms provide additional screening. The stand of pinyon-juniper on the plateau provide vegetative screening for users on the upper plateau. The open character of the south portion of the unit does not provide sufficient screening for solitude. Outstanding opportunities for solitude can be found within the unit, the deep, winding canyons have the most potential for providing solitude."

His conclusion was that the unit had outstanding opportunities for solitude. He also concluded that outstanding opportunities for a primitive and unconfined type of recreation existed in the canyon areas of the unit.

We have considered appellant's other contentions. However, they do not present compelling reasons for modification or reversal of the BLM decision to include the additional acreage in the WSA. Moreover, there is ample evidence that BLM gave adequate consideration to all of the factors involved, including the relevant imprints of man's work noted by appellant. 10/ In response to the protests filed concerning UT-060-201, BLM thoroughly reassessed the additional acreage on the basis of whether it satisfied the characteristic of naturalness. See, e.g., Letter to Sierra Club, Utah Chapter, dated February 26, 1981, at 3-4. This reassessment resulted in the deletion of 10,880 acres from that which would otherwise have been added to the WSA because of the State Office's failure to obtain the Director's exception.

The decision to designate certain land as part of a WSA is committed to the discretion of the State Director and will be affirmed in the absence of compelling reasons for modification or reversal. The burden of showing error is on one challenging the decision. C & K Petroleum Co., 59 IBLA 301 (1981); Sierra Club, 54 IBLA 31 (1981). Appellant has failed to meet its burden.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, IBLA 81-649 is affirmed and the appeal in IBLA 81-881 is dismissed.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge

10/ Factors which BLM was not required to consider, however, were potential human activity inside and outside the proposed WSA or the suitability of the land for agricultural or other use. These factors will be considered during the study phase of the wilderness review. Wilderness Inventory Handbook, Sept. 27, 1978, at 6-7; OAD 78-61, Change 3 at 4; see Union Oil Co. (On Reconsideration), 58 IBLA 166 (1981).